

Significant Pending Water Cases Against EPA
May 2009

1. Challenges to CAFO Rule
2. Chesapeake Bay Foundation Lawsuit
3. Litigation Challenging Oil and Gas Permits in Cook Inlet, Alaska
4. Litigation Addressing Florida Nutrient Criteria
5. Litigation Challenging Vessels General Permit
6. Mining Cases
7. Section 316(b) Litigation
8. Litigation Regarding Permitting of Pesticides Applications
9. Water Transfers Litigation

Generic Response on Litigation Issues

“I am [not] aware of the issue generally, and understand it is a matter in litigation. If I’m confirmed I will certainly be looking into it further and will follow up with you as appropriate.”

Mining Cases

Non-responsive

[REDACTED]

[REDACTED]

[REDACTED]

Coal River Watch v. Salaza (D.D.C.)

- Revisions to the Office of Surface Mining's Stream Buffer Zone Rule, which, under SMCRA, required EPA concurrence prior to promulgation, were finalized in December 2008. Lawsuits have been filed challenging both the rule's promulgation by OSM and EPA's concurrence.
- This week, Secretary Salazar confessed error in promulgation of the rule because of failure to properly consult with the U.S. Fish and Wildlife Service pursuant to the ESA and DOJ filed a motion to vacate the rule.

Water Transfers Litigation

Friends of the Everglades, et al. v. EPA (11th Cir.)

Catskill Mountains Chapter of Trout Unlimited, et al. v. EPA (S.D. NY)

Friends of the Everglades, et al. v. EPA (S.D. FL)

Issues in the cases: The principal issue is whether a “water transfer” requires an NPDES permit. The petitioners challenge EPA’s water transfers rule (“WTR”), which was published on June 13, 2008. 73 Fed. Reg. 33697.

This rule takes the position that water transfers generally do not require an NPDES permit. The WTR defines a water transfer as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." The exclusion from permitting requirements does not apply to pollutants introduced by the water transfer activity itself to the water being transferred, such as malfunctioning pumps that may contaminate the water being transferred with lubricants like oil and grease.

A number of organizations challenging the WTR believe that their challenges should be heard first by the U.S. District Courts. EPA’s position is that the U.S. Court of Appeals has original, exclusive jurisdiction over these challenges.

Parties

Plaintiffs (S.D. NY):

Catskill Mountains Chapter of Trout Unlimited, Inc.

Theodore Gordon Flyfishers, Inc.

Catskill-Delaware Natural Water Alliance

Federated Sportsmen’s Clubs of Ulster County, Inc.

Riverkeeper, Inc.

Waterkeeper Alliance, Inc.

States of New York, Connecticut, Delaware, Illinois, Maine, Michigan,

Minnesota, Missouri, and Washington

Province of Manitoba, Canada

Intervenor (S.D. NY) in support of EPA’s water transfers rule:

City of New York

Plaintiffs (S.D. FL):

Friends of the Everglades

Miccosukee Tribe of Indians of Florida

Rivers Coalition Defense Fund, Inc.

Florida Wildlife Federation, Inc.

Intervenor (S.D. FL) in support of EPA’s water transfers rule:

South Florida Water Management District

Petitioners (11th Cir) challenging EPA's WTR include all of the plaintiffs in the S.D. NY and S.D. FL challenges – with the exception of Rivers Coalition Defense Fund, Inc. – plus:

- Florida Wildlife Federation
- National Wildlife Federation
- Environment America
- Environment New Hampshire
- Environment Rhode Island
- Environment Florida
- Sierra Club
- Environmental Confederation of Southwest Florida, Inc.
- Commonwealth of Pennsylvania
- Jones River Watershed Coalition
- Massachusetts Audubon Society, Inc.
- Save the Bay, Inc.
- Taunton River Watershed Alliance, Inc.
- Michigan Council of Trout Unlimited
- Clean Water Action Council of Northeastern Wisconsin
- Trout Unlimited, Inc.

Intervenors (11th Cir.) in support of EPA's WTR:

- South Florida Water Management District
- United States Sugar Corporation

Entities seeking intervention (11th Cir.) in support of EPA's WTR:

- City of New York
- States of Colorado, New Mexico, Alaska, Idaho, Nebraska, Nevada, South Dakota, Utah, and Wyoming
- State of California on behalf of its Department of Water Resources
- Kern County Water Agency (CA)
- Westlands Water District (CA)
- San Luis and Delta-Mendota Water Authority (CA)
- Elsinore Valley Municipal Water District (CA)
- Northern Colorado Water Conservancy District
- Municipal Subdistrict of the Northern Colorado Water Conservancy District
- Central Arizona Water Conservation District
- City and County of Denver acting by and through its Board of Water

Commissioners

- City of Aurora (CO)
- Colorado Springs (CO)
- Metropolitan Water District of Salt Lake City (UT)
- Imperial Irrigation District (CA)
- Western Urban Water Coalition
- National Water Resources Association

Status of the cases: The challenges to the water transfers rule before the 11th Circuit, the S.D. FL and the S.D. NY have been stayed pending the outcome of a separate case, Friends of the Everglades v. South Florida Water Management District (aka, the “S-2” case), which is also before the 11th Circuit. At issue in the S-2 case is whether a particular water transfer requires an NPDES permit. The 11th Circuit heard oral argument in the S-2 case on January 16, 2009.